

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NICOLE HALL, as Administratrix of the Estate of
Amir Hall,

Plaintiff,

-vs-

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION, THE NEW YORK STATE
OFFICE OF MENTAL HEALTH, BRIAN
FISCHER, MICHAEL F. HOGAN, DANIEL J.
KANE, JOHN P. DISCHIAVO, DAVID A.
BUCKBEE, ROY JOHNSON, PAUL E.
LASHWAY, ROBERT T. EVANS, MICHAEL
P. HUSNAY, JAMES R. TEDESCO, JOSEPH P.
NORWICH, CHARLES KELLY, WILLIAM
HULIHAN, LEWIS RICHARD DAVIS,
LYUBOV SAVITSKIY, ZOE KINGSLEY,
SERGEANT J. KILBURN, SARAH NELSON,
YOLANDA. PERONI, MARILYN STEMEN,
NICOLE HUNTER, KELLY DEHIMER, JULIE
HUTCHINSON, DOWNSTATE/DOCCS JANE
AND JOHN DOES #1-10, DR. ROBERT
BAKALL, SHANNAN SULLIVAN, DR.
LAWRENCE FARAGO, JILL PORTER, KAREN
TORTELET, LORI CUNNINGHAM, MID-
STATE/MEDICAL JANE AND JOHN DOES #1-
10, LIEUTENANT DERIDER, LIEUTENANT
DUBERNECKI, D.S.S. WARD, CAPTAIN
CHRISTOPHER J. HOLMER, MID-
STATE/DOCCS JANE AND JOHN DOES #1- 10,
DR. DANIELLE DILL-LEWIS, GREAT
MEADOW /DOCCS JANE AND JOHN DOES
#1-10,

Defendants.

AMENDED ANSWER

**12-CV-0377
(GTS)(DEP)**

Defendants The New York State Department of Corrections and Community
Supervision, The New York State Office of Mental Health, Brian Fischer, Michael F.
Hogan, Daniel J. Kane, John P. Dischiavo, David A. Buckbee, Roy Johnson, Paul E.

Lashway, Robert T. Evans, Michael P. Husnay, James R. Tedesco, Joseph P. Norwich, Charles Kelly, William Hulihan, , Lyubov Savitskiy, Sergeant J. Kilburn, Sarah Nelson, Yolanda. Peroni, Marilyn Stemen, Nicole Hunter, Kelly Dehimer, Julie Hutchinson, Dr. Robert Bakall, Shannan Sullivan, Dr. Lawrence Farago, Jill Porter, Karen Tortelet, Lori Cunningham, Lieutenant Derider, Lieutenant Dubernecki, D.S.S. Ward, Captain Christopher J. Holmer, and Dr. Danielle Dill-Lewis, by their attorney, ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Timothy P. Mulvey, Assistant Attorney General, of counsel, answer the complaint herein as follows:

1. Admit upon information and belief the allegations contained in paragraphs, 10, 11, 13, 15, 22, 26, 27, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54, 115, 119, 121, 125, 136, 137, 155, 197, 209, 210, 220, and 253 of the complaint.

2. Admit that at all times relevant to the actions complained of that the individual defendants identified in paragraphs 14, 16, 17, 18, 19, 20, 21, 24, 25, 28, 29, 30, 31, 33, 34, 35, 36, and 51 were employees of the State of New York, but deny information sufficient to form a belief as to the truth of the allegations contained in the remainder of those same paragraphs.

3. Admit that some but not all of the defendants referred to in paragraph 243 of the complaint provided medical and/or mental health services to plaintiff and deny information sufficient to form a belief as to the truth of the allegations contained in the remainder of that same paragraph.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 9, 23, 32, 37, 52, 55, 56, 57, 58, 59, 60, 61, 62, 66, 68, 71, 74, 76, 77, 81, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, 99,

100, 102, 104, 107, 110, 112, 114, 116, 117, 118, 123, 126, 127, 130, 131, 133, 134, 135, 138, 139, 140, 141, 143, 144, 145, 147, 148, 149, 150, 151, 152, 153, 154, 181, 195, 196, 207, 208, 221, 224, 228, 229, 239, 247, 257, 258, 259, 260 and 270 of the complaint.

5. Deny the allegations contained in paragraphs 2, 3, 4, 12, 63, 65, 67, 69, 70, 72, 73, 75, 78, 79, 80, 82, 87, 94, 101, 103, 105, 106, 108, 109, 111, 113, 120, 122, 124, 128, 129, 132, 164, 174, 175, 176, 177, 178, 179, 180, 182, 183, 186, 187, 188, 189, 190, 191, 192, 198, 199, 200, 201, 202, 204, 211, 212, 213, 214, 215, 217, 222, 223, 225, 226, 227, 230, 231, 234, 235, 236, 237, 238, 240, 244, 245, 246, 248, 249, 250, 254, 255, 256, 263, 264, 265, 266, 267, 268, 269, 271, 274, 275, 276, 277, 278, 279, and 280 of the complaint.

6. Paragraphs 5, 6, 7, 8, 166, 173, 184, 185, 193, 194, 203, 205, 206, 216, 218, 219, 232, 233, 241, 242, 251, 252, 262, 272, 273 and 281 of the complaint contain statements of law or legal conclusions that are more appropriately suited for determination by the Court. As such, these paragraphs do not require a formal responsive pleading. Defendants deny all other allegations contained in those paragraphs.

7. Defendants respectfully refer the Court to the documents referenced within paragraphs 64, 102, 104, 142, 146, 156, 157, 158, 159, 160, 161, 162, 163, 167, 168, 169, 170, 171, and 172 of the complaint as the most accurate and best evidence of their content and deny all allegations that are inconsistent therewith.

8. Deny any allegation of the complaint not specifically responded to above.

Affirmative Defenses

9. The complaint fails, in whole or in part, to state a claim upon which relief can be granted.

10. At all relevant times, defendants Brian Fischer, Michael F. Hogan, Daniel J. Kane, John P. Dischiavo, David A. Buckbee, Roy Johnson, Paul E. Lashway, Robert T. Evans, Michael P. Husnay, James R. Tedesco, Joseph P. Norwich, Charles Kelly, William Hulihan, , Lyubov Savitskiy, Sergeant J. Kilburn, Sarah Nelson, Yolanda. Peroni, Marilyn Stemen, Nicole Hunter, Kelly Dehimer, Julie Hutchinson, Dr. Robert Bakall, Shannan Sullivan, Dr. Lawrence Farago, Jill Porter, Karen Tortelet, Lori Cunningham, Lieutenant Derider, Lieutenant Dubernecki, D.S.S. Ward, Captain Christopher J. Holmer, and Dr. Danielle Dill-Lewis acted under the reasonable belief that their conduct was in accordance with clearly established law. They are, therefore, protected under the doctrine of qualified immunity.

11. The complaint is barred, at least in part, under principles of res judicata and collateral estoppel.

12. To the extent plaintiff alleges state law claims, they are barred by section 24 of the Correction Law, by the Eleventh Amendment, and by other state law.

13. The complaint is barred, in whole or in part, by the applicable statute of limitations.

14. The complaint is barred, in whole or in part, under the Eleventh Amendment.

15. Some of the defendants were not personally involved in the alleged constitutional or statutory violations, and they are therefore not liable under 42 U.S.C. §

1983. The doctrine of respondeat superior does not apply in civil rights cases, and the complaint should therefore be dismissed.

16. Defendants The New York State Department of Corrections and Community Supervision, The New York State Office of Mental Health, Brian Fischer, Michael F. Hogan, Daniel J. Kane, John P. Dischiavo, David A. Buckbee, Roy Johnson, Paul E. Lashway, Robert T. Evans, Michael P. Husnay, James R. Tedesco, Joseph P. Norwich, Charles Kelly, William Hulihan, , Lyubov Savitskiy, Sergeant J. Kilburn, Sarah Nelson, Yolanda. Peroni, Marilyn Stemen, Nicole Hunter, Kelly Dehimer, Julie Hutchinson, Dr. Robert Bakall, Shannan Sullivan, Dr. Lawrence Farago, Jill Porter, Karen Tortelet, Lori Cunningham, Lieutenant Derider, Lieutenant Dubernecki, D.S.S. Ward, Captain Christopher J. Holmer, and Dr. Danielle Dill-Lewis deny that they ever acted in willful disregard of the plaintiff's rights. Plaintiff is therefore not entitled to the punitive damages that he seeks.

17. The complaint fails to establish a violation of federal constitutional rights and this court lacks jurisdiction over the subject matter.

18. Plaintiff's allegations sound in the nature of an ordinary negligence claim and do not raise a constitutional issue cognizable in a 42 U.S.C. section 1983 action.

19. To the extent this action is brought for mental or emotional injury, plaintiff is barred from proceeding without a prior showing of physical injury.

20. Upon information and belief, plaintiff has been convicted of one or more felonies or other crimes for which there are or may be restitution orders pending. Pursuant to section 807 of the Prison Litigation Reform Act of 1995, any compensatory damages to be awarded plaintiff herein shall be paid directly to satisfy any such

outstanding orders until paid in full. Therefore, plaintiff may or may not be entitled to any payment herein.

21. Defendants hereby assert a defense under *Mount Healthy City School District Board of Education v. Doyle* 429 U.S. 214 (1977), which prevents recovery against an employer whose decision was in part motivated by some wrongful consideration where the employer can show that even in the absence of the wrongful consideration, it would have made the same decision.

22. With respect to plaintiff's pendent state law causes of action, the negligence or culpable conduct of the decedent caused or contributed to cause the injuries and damages complained of, then plaintiff's award, if any, should be reduced in proportion to the negligence or culpable conduct decedent bears responsibility for which caused those injuries or damages.

23. With respect to plaintiff's pendent state law causes of action, plaintiff lacks capacity to maintain those claims.

24. With respect to plaintiff's pendent state law causes of action, if the negligence or culpable conduct other than that of the decedent caused or contributed to cause the decedent's injuries and damages complained of, and it was the negligence or fault of a third party, then defendants should note bears responsibility for the third party or parties that caused those injuries or damages.

WHEREFORE, defendants respectfully request this Court deny the relief requested, dismiss the complaint, and grant such other relief as the Court shall deem just and equitable.

Dated: Syracuse, New York
June 28, 2013

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendants
615 Erie Boulevard West, Suite 102
Syracuse, New York 13204-2465

By: s/ Timothy P. Mluvey
Timothy P. Mluvey
Assistant Attorney General
Bar Roll No. 510
Telephone: (315) 448-4800

TO: All Counsel of record (via CM/ECF)